Supreme Court, U.S.
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No. 00-66

IN THE

Supreme Court of the United States

CONNIE LYNN MADRAY
and MELODY HOLDEN,

Petitioners,

v.

PUBLIX SUPER MARKETS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Respondent submits that, upon a fair reading of the decision of the Court of Appeals and of the facts considered, the issues should be restated as follows:

I. Where an employer promulgates a sexual harassment policy reasonably designating accessible persons responsible for receiving and addressing complaints, may an employee seek damages for the time during which the employee delayed in contacting the designated persons and using the known procedure, which was immediately effective when used?

II. May a fact-finder infer notice to an employer of hostile-environment sexual harassment through discussion of an employee with a lower level supervisor (subordinate to the alleged perpetrator) who is not designated to receive or address complaints in a known sexual harassment procedure, is not requested to take the complaint higher or take any action, and receives limited information (not the hostile-environment sexual harassment allegation)?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Publix Super Markets, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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Rule:

Supreme Court Rule 15 1

STATEMENT OF THE CASE

In accordance with Supreme Court Rule 15, the following are perceived misstatements or omissions of fact bearing on the issues brought before the Court.

As found by the District Court and an unanimous Eleventh Circuit panel, it is undisputed that Respondent Publix Super Markets, Inc. ("Publix" or "Respondent") had implemented a sexual harassment policy whereby employees "must report such offensive conduct or situations to the Store Manager, District Manager or Divisional Personnel Managers"[1] or the Employee Assistance Coordinator, and that the Petitioners Holden and Madray ("Petitioners") admittedly knew and understood the complaint procedures and whom they should contact. Yet, Petitioners unreasonably delayed in using the complaint procedures to report alleged sexual harassment, although the first designated person (the District Manager) was readily accessible. When contacted by Petitioners, the District Manager immediately instituted corrective action regarding the alleged perpetrator, the Store Manager (Selph), removing him from the store, never to return or be seen by Petitioners again.

In seeking to recover damages during their delay, Petitioners point to an incident witnessed by a manager (bakery manager Neff) subordinate to the Store Manager. As found below, this occurred two to three weeks before the District Manager was contacted and took corrective action. Further, Neff stopped the offensive action at the time and told Petitioner Holden that if it continued, and she did not

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1. Which Divisional Personnel Managers were listed by name.

complain, he would take further action. Petitioner Holden responded that she would talk with Petitioner Madray and make arrangements to see the District Manager. As Petitioners acknowledge, shortly thereafter, this led to contact with the District Manager and immediate corrective action.

Petitioners also refer to several comments which they earlier made to other subordinate managers, the context of which, as found below, lacked reasonable notice to Publix or to the subordinate manager given the limited information provided, the social context and the lack of an adequate complaint in a professional capacity. Petitioners refer to one discussion with a female second assistant manager[2] (Clark) at a party at a restaurant where Petitioner Holden said that it made her sick for the Store Manager to hug, touch, and kiss her.[3] A month later, at a social occasion at a restaurant for dinner, dancing, and drinking, Petitioner Holden told another second assistant manager (Priest) of one incident where the store manager kissed her on the neck. It is undisputed that neither Petitioner then asked either of the subordinate managers to take their complaint higher. It was found below that in these circumstances and without any complaint explaining the dimensions of the alleged harassment, these limited comments at parties cannot be considered adequate notice of the Store Manager's alleged sexual harassment to Publix. Notably, when Petitioners decided to complain to the District Manager, they told Priest that they wanted to file a complaint and asked if he could help them out, and he did so immediately by contacting the District Manager.

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2. A second assistant manager, as the title suggests, is two levels below the Store Manager.

3. Clark, in the investigation, stated that the Store Manager was "not like that, he is a real nice person."

The District Court awarded summary judgment in favor of Publix, finding that "[a]rmed with the knowledge contained in the policy manual, which they chose not to follow, plaintiffs unreasonably failed to take advantage of preventative or corrective opportunities provided by Publix." *Madray v. Publix Super Markets, Inc.*, 30 F. Supp. 2d 1371, 1376 (S.D. Fla. 1998). A unanimous Eleventh Circuit affirmed, finding that Publix promulgated an effective sexual harassment policy, that petitioners acted unreasonably in delaying their use of the complaint procedures, and, upon effective notice, Publix responded promptly to correct the alleged harassment. *Madray v. Publix Super Markets, Inc.*, 208 F.3d 1290, 1302 (11th Cir. 2000).

REASONS FOR DENYING THE WRIT

I.

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS ENTERED A DECISION THAT DOES NOT CONFLICT WITH THE CITED DECISIONS OF TWO OTHER COURTS OF APPEAL, PARTICULARLY WHEN THE FACTUAL SITUATIONS OF THE CASES ARE FAIRLY ACCOUNTED FOR.

In *Faragher v. City of Boca Raton*, 524 U.S. 775, 805 (1998), this Court recognized that to "avoid this particular temptation to litigate," an affirmative defense to sexual harassment claims is available where the employee failed to act with reasonable care and to use a complaint procedure provided by the employer. This defense was found to be consistent with the statutory policy of Title VII to give credit

to employers who make reasonable efforts to prevent violations. In *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998), this Court further noted that such a defense is appropriate because:

> [T]itle VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context.

Thus, this Court in *Faragher* and *Ellerth* concluded that where the evidence showed "an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden." *Id.* at 765; *Faragher*, 524 U.S. at 807.

The petition here seeks what this Court decided to avoid by recognizing the defense. While this Court sought to effect "Congress' intention to promote conciliation rather than litigation," the petition here seeks to promote litigation where an employee has, but does not use, a known, accessible, and effective complaint procedure that works immediately upon use. While this Court sought to recognize Title VII's design "to encourage the creation of antiharassment policies and effective grievance systems," this petition seeks to have such grievance systems ignored and to award damages to employees for doing so. And while this Court found that the unreasonable failure to use the complaint procedure would "normally suffice" in establishing the defense, this petition seeks a norm of continued litigation for damages, even where the Petitioners unreasonably

failed to use a known and accessible procedure which was immediately effective.[4]

The Petitioners' assertion that the decision below conflicts with the decision of the Third Circuit in *Hurley v. Atlantic City Police Dep't*, 174 F.3d 95 (3d Cir. 1999), and the Fifth Circuit in *Williamson v. City of Houston*, 148 F.3d 462 (5th Cir. 1998), is incorrect. This is a case of two plaintiffs who unreasonably delayed in using a known, accessible, and fully effective procedure to complain about sexual harassment, while *Williamson* and *Hurley* are cases where the plaintiff repeatedly followed the procedure, but to no avail whatsoever.

In *Williamson*, the plaintiff, a female police officer, was repeatedly sexually harassed by a male officer for about eighteen months. *Williamson*, 174 F.3d at 464. The plaintiff repeatedly complained to her supervisor, a sergeant, in the squad room and in his office. *Id.* The city's sexual harassment policy provided that the employee "should report the alleged act immediately to his/her supervisor." *Id.* at 467. Her sergeant-supervisor had "authority to address the harassment problem," was the plaintiff's supervisor "in an organization with a strong chain of command," "could have directed [the subordinate perpetrator] to cease his harassing behaviors" and could have subjected the subordinate

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4. Contrary to Petitioners' argument, victims of hostile work environment harassment are not worse off under *Madray* than before the Court decided *Faragher* (Petition at 10). In fact, the decision below helps eliminate confusion by encouraging employers to develop and promulgate anti-harassment policies and complaint procedures that identify who should receive complaints. Indeed, there was no confusion here — Petitioners knew to complain to the District Manager and when they did he stopped the harassment.

perpetrator to discipline for failure to obey. *Id.* However, the sergeant was "wholly unresponsive" to the plaintiff's complaints, other than to arrange a temporary (two months) work reassignment during which the harassment continued when the plaintiff was in the squad room. *Id.* at 464. Finally, when the sergeant reassigned the plaintiff to work with the perpetrator, she complained to internal affairs and was then transferred out of the division. *Id.*

The defendant, City of Houston, attempted to claim (1) that it did not have notice of the sexual harassment until the internal affairs complaint, and (2) that the sergeant's knowledge could not be imputed to the city. *Id.* The court recognized that there was much evidence of the sergeant's awareness of the harassment and that the sergeant had authority to stop his subordinate. *Id.* Upon review of the sexual harassment policy and its express direction to the plaintiff to report harassment to her supervisor (the sergeant), the court stated:

> When an organization designates a particular person or persons to receive harassment complaints, it sends a clear signal that those persons have the authority to accept notice of harassment problems.

Id.

Petitioners attempt to suggest that *Williamson* "rejected" an argument by the city which would have required reporting by the aggrieved employee beyond any low level supervisor. That is not the case. The *Williamson* decision rejected an argument requiring reporting beyond the **designated** supervisor stating:

> If the employer has structured its organization such that a given individual has the authority to accept

> notice of a sexual harassment problem, then notice to that individual is sufficient to hold the employer liable.

Id.

Clearly, the holding in *Williamson* is in complete accord with the decision here and not in conflict in any material way. The Eleventh Circuit held here that (1) Publix reasonably provided in its policy alternative avenues for lodging a complaint, (2) although the policy's only designated representative in the Petitioners' store was the Store Manager (who was the alleged perpetrator), the other designated representatives were readily accessible and there were also multiple avenues for lodging complaints outside the chain-of-command, so that (3) in conclusion, Publix cannot be charged with notice of harassment via informal complaints to subordinate managers in the store "**not designated** to receive complaints of sexual harassment under Publix's anti-harassment policy." *Madray*, 208 F.3d at 1302.

In *Hurley*, the Third Circuit was faced with another case involving harassment of a female police officer by co-workers. Notably, her immediate supervisor, a captain, "was responsible for preventing and redressing the harassment, pursuant to the ACPD's own policy." *Hurley*, 174 F.3d at 118. Although the co-workers' harassment of the plaintiff was extensive including "egregious examples of . . . offensive material, of appalling low character," and her supervisor was personally aware of the harassment and of her complaints, her supervisor (the captain), took no action against it, instead offering several offensive observations of his own. *Id.* at 104. The court thus found, unlike here, that

the policies were not enforced and that the department "failed to make a colorable case that its policies met the *Ellerth/ Faragher* standards." *Id.* at 118. Moreover, when the department attempted to argue that the plaintiff should have gone beyond its policy designation which placed responsibility on the supervisor (captain) and complained through the union grievance system, to the affirmative action officer, or to the chief, the court found that there was also extensive evidence about the ineffectiveness of those procedures. *Id.* at 105.

Again, the decision in *Hurley* is fully in accord with the holding here. As in *Williamson*, the plaintiff in *Hurley* contacted the person designated in the sexual harassment policy with responsibility to receive the complaint and address the harassment. As in *Williamson*, and as held here, that designation carries with it the responsibility of taking appropriate action on the complaint. However, in *Hurley*, as in *Williamson*, the designated supervisor failed to act upon the complaint, while here the designated person immediately took appropriate corrective action. Fairly considering and accounting for these differences in the facts, there clearly is no conflict in the decisions. Instead, the Third, Fifth and Eleventh Circuits all are in full agreement as to the importance of the plaintiff contacting the designated person in the policy because the designation (in the words of the Fifth Circuit) "sends a clear signal that those persons have the authority to accept notice of harassment problems." *Williamson*, 148 F.3d at 466.

II.

THE UNITED STATES COURT OF APPEALS HAS AFFIRMED A FINDING OF AN UNREASONABLE FAILURE BY PLAINTIFFS TO USE A KNOWN, EFFECTIVE COMPLAINT PROCEDURE WHICH THIS COURT HAS TWICE HELD "WILL NORMALLY SUFFICE" AS A COMPLETE AFFIRMATIVE DEFENSE TO THEIR CLAIMS.

In both *Faragher* and *Ellerth*, this Court held that "any unreasonable failure to use any complaint procedure provided by the employer" will "normally suffice" to establish a complete defense to plaintiffs' claims. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. Although that is clearly what occurred here, Petitioners nevertheless seek damages for their failure to use the complaint procedure by continuing in their argument to ignore the complaint procedure's designation of persons to receive complaints and suggesting that the Court of Appeals' holding was instead that "only complaints to 'higher management' are sufficient" (Petition at 15). That is not the case.

Petitioners cite to *Faragher* and make an unwarranted argument that this case involves an important question not reached there of whether the employer knew of harassment vicariously through the knowledge of supervisors. The issue the Court did reach in *Faragher* was that the employer (unlike here) had no "serious prospect" of presenting the affirmative defense of an unreasonable failure to use the complaint procedure. That was because (unlike here), that employer "entirely failed to disseminate its policy against sexual harassment," failed to provide that "harassing supervisors could be bypassed in registering complaints," and "made no

attempt to keep track of the conduct of supervisors." *Id.* at 808. The point of *Faragher* is that there is an "affirmative defense" consisting of two elements: (1) "proof that [the] employer promulgated an anti-harassment policy with a complaint procedure" which was "suitable to the employment circumstances" and (2) proof that the plaintiffs (as here) unreasonably failed to use a complaint procedure. *Id.* at 807. Both elements were proved here and the result was an "affirmative defense" to Petitioners' claims.

Rather than being a case of a refusal to impute to a corporation knowledge of a sexually hostile environment by lower level supervisors, the Court of Appeals held here that given the existence of "an effective sexual harassment policy with appropriate complaint procedures," the employer would not be charged with notice via informal and limited complaints to lower level supervisors "**who were not designated to receive complaints**"[5] under the policy. *Madray*, 208 F.3d at 1302. This is an application of the affirmative defense already established in *Faragher* and *Ellerth* raising no important, unanswered questions.

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5. Petitioners' references to the District Manager being upset about not being told about another female employee's complaint about an attempted spanking and to the bakery manager's (Neff) statement that he would complain if the conduct continued do not create notice to the corporation of an alleged sexually hostile environment regarding Petitioners. Rather, they show the desire of management to effectively prevent any objectionable conduct.

CONCLUSION

The decision entered by the Eleventh Circuit is in accord with this Court's holdings in *Faragher* and *Ellerth* and does not present any conflict with decisions entered by the Third and Fifth Circuits. Thus, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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